IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 61498-3-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
TRAVIS WILLIAM COLEMAN,	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: August 17, 2009
	)	

Ellington, J. — Travis Coleman was convicted of two counts of first degree child molestation for conduct involving his nine year old nephew. In this appeal, he principally contends the court violated his right to a public trial by sealing jury questionnaires. We agree that the court erred in its sealing procedure, but the error did not violate Coleman's right to a public trial. Because the error was not structural, the proper remedy is not reversal, but remand for reconsideration of the sealing order. We find no merit in the remainder of Coleman's arguments, and affirm in all other respects.

BACKGROUND

When TMB was nine years old, he lived for a time with his grandparents and Coleman. When he returned to live with his mother, he disclosed that Coleman had

sexually abused him on numerous occasions. His mother immediately contacted the police.

TMB described the abuse to his mother, to a child interview specialist, and to a pediatrician trained in sexual abuse cases. He indicated that Coleman had engaged him in viewing child pornography, kissing with tongues, mutual masturbation, and oral sex. The abuse first occurred during a family trip to a cabin, and regularly thereafter while TMB resided with Coleman (20 to 40 times in all).

The State charged Coleman with one count of rape of a child in the first degree and three counts of first degree child molestation. All counts had the same charging period. Because the incident at the cabin occurred in another county, it was not included among the charges.

At trial, the State introduced recordings of TMB's interviews with the investigator and pediatrician. TMB's live testimony differed from these recorded statements. For example, TMB testified he thought the abuse only happened three times, including the time at the cabin, and he denied that he ever touched Coleman's penis. TMB testified that he was embarrassed to be in court and found it tough to talk about the abuse.

The jury convicted Coleman of two counts of molestation, acquitted him of the third, and did not reach a verdict on the rape charge. Coleman appeals.

DISCUSSION

The chief issue in this appeal is the court's handling of jury questionnaires. Members of the venire completed questionnaires that included certain matters of

sexual history. The jury was then questioned in open court, selected and sworn.

Three court days later, the court, apparently on its own motion, ordered the questionnaires sealed,[1] making the following finding:

> The court finds compelling circumstances for sealing the documents indicated below:
>
> Jury questionnaires containing personal sexual history of prospective jurors related to issues in this case. The individual juror's right to privacy in this information greatly outweighs the public's right to access the court files.[2]

The order provided that trial and appellate defense counsel and the King County Prosecutor's Office were "authorized to review the documents and to purchase copies thereof without further court order."[3] Additionally, the order provided that "[i]n the event of an application for the opening or copying of the sealed documents, notice shall be given or attempted to [the prosecutor's office and defense counsel] and hearing noted."[4] No party objected.

Coleman contends the court's failure to undertake a State v. Bone-Club[5] analysis before entering the sealing order violated his right and that of the public to an open and public trial. He contends that the error is structural and that the required remedy is a new trial.[6]

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[1] The jury was selected and sworn on January 29, 2008. The sealing order was entered February 4, 2008.

[2] Clerk's Papers at 188.

[3] Id.

[4] Id.

[5] 128 Wn.2d 254, 906 P.2d 325 (1995).

[6] Coleman does not assert a violation of the First Amendment. Relying on Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508–10, 104 S. Ct. 819, 78 L. Ed.

Whether a trial court procedure violates the right to a public trial is a question of law. Our review is de novo.[7]

Both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee criminal defendants the right to a public trial.[8] In addition, article I, section 10 of the Washington Constitution secures the public's right to open and accessible proceedings.[9] These provisions "assure a fair trial, foster public understanding and trust in the judicial system and give judges the check of public scrutiny."[10] The guarantee of open criminal proceedings extends to jury selection, which is important "'not simply to the adversaries but to the

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2d 629 (1984), several courts have held that jury questionnaires are presumptively open under the First Amendment. See, e.g., State ex rel. Beacon Journal Publishing Co. v. Bond, 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002) (observing that "virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness") (citing cases). Interestingly, these cases seek to balance juror privacy, the defendant's right to a fair trial in which prospective jurors feel free to give candid responses to highly personal questions, and the public's right to open proceedings by endorsing practices specifically rejected by numerous Washington decisions, to wit, in camera voir dire proceedings during which a prospective juror may discuss sensitive matters privately, on the record, with counsel present; sealing of the transcript of that proceeding; and redaction of jurors' names from questionnaires before they become part of the public record.

[7] State v. Duckett, 141 Wn. App. 797, 802, 173 P.3d 948 (2007) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

[8] Brightman, 155 Wn.2d at 514. Article I, section 22 of the Washington Constitution states: "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial." The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

[9] Duckett, 141 Wn. App. at 803 ("'[j]ustice in all cases shall be administered openly, and without unnecessary delay'" (quoting Wash. Const. art. I, § 10)).

[10] Id. (citing Brightman, 155 Wn.2d at 514).

criminal justice system.'"[11]

In Bone-Club, the Washington Supreme Court set out the standards for closing all or any portion of a criminal trial.[12] The court adopted a five part analysis necessary to protect both the public's right under article I, section 10 and the defendant's rights under article I, section 22:

> "1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
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> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
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> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
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> 4. The court must weigh the competing interests of the proponent of closure and the public.
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> 5. The order must be no broader in its application or duration than necessary to serve its purpose."[13]

In State v. Waldon,[14] we held the same analysis applies to the sealing of court documents.

Coleman argues that a jury questionnaire is part of jury selection and must therefore remain open to the public. He relies heavily on recent cases disapproving

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[11] In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter., 464 U.S. at 505).

[12] 128 Wn.2d at 258–59.

[13] Id. (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)); see also Seattle Times v. Ishikawa, 97 Wn.2d 30, 36–39, 640 P.2d 716 (1982).

[14] 148 Wn. App. 952, 967, 202 P.3d 325 (2009) (petition for review pending). The trial court here did not have the benefit of this decision, which came after Coleman's trial.

the practice of conducting individual voir dire in private, whether to protect juror privacy or to keep potentially prejudicial information from tainting the jury pool.[15]

The State points out that these cases involved private voir dire, whereas here, the jury was questioned in open court. But article 1, section 10 ensures public access to court records as well as court proceedings.[16] The State does not contend jury questionnaires filed with the clerk and sealed by the court are not court records. The State offers no meaningful way to distinguish court records containing written responses to questionnaires from oral responses during voir dire.

The State argues, however, that the questionnaires are not public information under General Rule (GR) 31(j). GR 31 states that "[a]ccess to court records is not absolute and shall be consistent with reasonable expectations of personal privacy." Subsection (j) concerns juror information:

> Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or a member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

The State contends GR 31 "demonstrates that the Supreme Court did not intend to subject private juror information to the same procedure or scrutiny as the sealing of

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[15] See State v. Sadler, 147 Wn. App. 97, 110, 193 P.3d 1108 (2008); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008); Duckett, 141 Wn. App. at 809. Petitions for review have been filed in each of these cases, and are either still pending or have been stayed pending decisions in State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), rev. granted, 163 Wn.2d 1012 (2008) and State v. Strode, Wash. Sup. Ct. No. 80849-0.

[16] Waldon, 148 Wn. App. at 957.

other court documents."[17]

But "'[c]ourt rule[s] cannot be interpreted to circumvent or supersede a constitutional mandate.'"[18] In State v. Duckett,[19] Division Three of this court considered a somewhat similar scenario. There, the trial court gave prospective jurors a questionnaire, stating that it would be "filed in the court file under seal and not accessible to anyone without a court order."[20] Jurors whose questionnaires indicated experience with sexual abuse were then questioned individually in the jury room.

Duckett appealed, arguing that private questioning of the jurors violated his public trial right. Reading GR 31 in accord with GR 15, the majority agreed, concluding that "[t]he privacy interests of jurors acknowledged by GR 31 are simply part of the Bone-Club analysis."[21] The majority rejected the dissent's argument that no courtroom closure occurred because the information provided was confidential under GR 31(j), and "one cannot close what is not open."[22]

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[17] Resp't's Br. at 24.

[18] Waldon, 148 Wn. App. at 965 (quoting Duckett, 141 Wn. App. at 808); see also In re Det. of D.F.F., 144 Wn. App. 214, 183 P.3d 302, rev. granted, 164 Wn.2d 1034 (2008) (Mental Proceedings Rule 1.3 violates article I, section 10 by making mental illness commitment proceedings presumptively closed).

[19] 141 Wn. App. 797, 173 P.3d 948 (2007).

[20] Id. at 801.

[21] Id. at 808.

[22] Id. at 811 (Brown, J., dissenting).

The State points out that Duckett did not address whether sealing the questionnaires required a Bone-Club analysis, and argues that the "questionnaires themselves are not a court proceeding,"[23] so sealing them was not a court closure requiring a Bone-Club analysis. But as pointed out above, the State offers no rationale for distinguishing between court records and court proceedings for purposes of this analysis, and we held in Waldon that an order sealing court records requires a Bone-Club analysis.[24]

We agree with the Duckett court that GR 31 must be read in accord with GR 15, that both rules are subject to the constitutional mandate of open records, and that the presumption of juror privacy provided in GR 31 is properly considered as part of the Bone-Club analysis.[25] [26]

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[23] Resp't's Br. at 25.

[24] 148 Wn. App. at 967.

[25] See Duckett, 141 Wn. App. at 808.

[26] We also agree with the Duckett observation that "this case is . . . not about limiting the ability of the trial courts to develop procedures that respect the privacy interests of prospective jurors and encourage more forthright answers to sensitive voir dire questions." Id. at 802. This area of the law is fast developing, as demonstrated by the fact that the trial judge in this case did not have the benefit of our decision in Waldon.

Further, several related cases are pending before the Washington Supreme Court. See State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), rev. granted in part, 163 Wn.2d 1012 (2008) (argued June 10, 2008; question is whether right to public trial was violated when trial court conducted a portion of voir dire in chambers after potential jurors asked to be questioned individually and court and both counsel agreed); State v. Strode, No. 80849-0 (argued June 10, 2008; issue is whether trial court violated right to public trial by conducting voir dire in chambers and whether defendant waived challenge by participating without objection).

We are confident that trial judges will develop appropriate procedures within constitutional mandates once those mandates are clear.

Under these authorities, the court should have conducted a Bone-Club analysis before sealing the questionnaires. Violation of the public's right to open court records requires remand for reconsideration of the order.

Coleman contends that sealing the questionnaires without conducting the Bone-Club analysis amounted to structural error, from which prejudice is presumed and for which a new trial is warranted.[27] On these facts, we do not agree that structural error occurred. The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right, and did not "'create defect[s] affecting the framework within which the trial proceeds.'"[28]

The error was not structural. Coleman does not suggest any possible prejudice to him resulting from the order. Reversal is therefore not the remedy.

We remand for reconsideration of the closing order under Bone-Club and Waldon, but otherwise affirm.

The remainder of this opinion has no precedential value and will filed for public record in accordance with RCW 2.06.040.

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[27] See Duckett, 141 Wn. App. at 809; Erickson, 146 Wn. App. at 211; Sadler, 147 Wn. App. at 118; Momah, 141 Wn. App. at 709.

[28] In re Det. of Kistenmacher, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (Sanders, J., concurring in part, dissenting in part) (alteration in original) (quoting Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Jury Selection

Coleman's jury venire was drawn from only one region of King County pursuant to recently enacted statutes[29] and an implementing court rule.[30] Coleman contends the statute and rule violate article 1, section 22 of the Washington Constitution, which guarantees the right to "a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." This argument was rejected by the Washington Supreme court in State v. Lanciloti,[31] and we need address it no further.

Sufficiency of the Evidence

Next, Coleman contends his molestation convictions must be reversed because the State argued that the jury could convict him of these charges based upon French (tongue) kissing alone, which he contends is insufficient evidence of sexual contact. Evidence is sufficient to support a conviction if, after viewing all the evidence in the light most favorable to the State, any rational juror could have found the elements of the crime beyond a reasonable doubt.[32] "'[A]ll reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant.'"[33]

A person is guilty of child molestation in the first degree when the person has sexual contact with another who is less than 12 years old and not married to the perpetrator and the perpetrator is at least 36 months older than the victim.[34] "Sexual

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[29] RCW 2.36.055; King County Local General Rule (KCLGR) 18.

[30] KCLGR 18(e)(1) (suspended effective April 1, 2008).

[31] 165 Wn.2d 661, 671, 201 P.3d 323 (2009).

[32] State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

[33] Id. (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

[34] RCW 9A.44.083.

contact" is defined as "any touching of the sexual *or other intimate parts* of a person done for the purpose of gratifying sexual desire of either party or a third party."[35] Which anatomical areas constitute intimate parts is a question for the jury.[36] The State argued in closing that the jury could find sexual contact from evidence that Coleman and TMB had kissed using their tongues.[37]

Coleman relies on State v. R.P.,[38] which, according to Coleman, held that sucking on the victim's neck so as to result in a hickey could not constitute sexual contact under the indecent liberties statute, which includes an identical definition of sexual contact. This assertion is not accurate. In a two paragraph per curiam opinion, the court held, without elaboration, that there was insufficient evidence to convict the respondent, a junior high school student, of sexual contact where he picked up a classmate after a track practice and hugged her, kissed her, and placed a hickey on her neck.[39] It is unclear what aspect of the evidence the court found to be insufficient, but the definition of sexual contact requires both touching of intimate parts

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[35] RCW 9A.44.010(2) (emphasis added).

[36] In re Welfare of Adams, 24 Wn. App. 517, 520, 601 P.2d 995 (1979).

[37] The prosecutor argued: "Another example is you heard from Ms. Brooks. [TMB] told the intake counselor that he and the defendant had kissed using their tongues. Again, contact with a person's sexual or intimate parts. And the lips, the mouth, not always a sexual or intimate part, but when you combine that with using tongues, it is, in fact, a sexual contact for the purposes of sexual gratification of one or both of the parties." Report of Proceedings (RP) (Feb. 6, 2008) at 9–10. The State also argued that evidence of oral sex and mutual masturbation would also satisfy this element.

[38] 122 Wn. 2d 735, 862 P.2d 127 (1993).

[39] Id. at 736. In its one sentence resolution of the matter, the court stated, "After examining the record and the facts of this case, we find that there was insufficient evidence of sexual contact to sustain count 1 (indecent liberties)." Id.

and that the touching be for purposes of sexual gratification.

Coleman also relies on this court's decision in R.P, where we applied the rule of ejusdem generis to hold that "other intimate parts" must be parts of the body "commonly associated with sexual intimacy."[40]

Coleman asserts the mouth and tongue are not commonly associated with sexual intimacy, and therefore kissing cannot constitute sexual contact. This would require us to say as a matter of law that kissing is not sexual contact.[41] We decline this invitation. A jury could reasonably infer that kissing with tongues constitutes contact with intimate parts for purposes of sexual gratification, particularly where, as here, kissing was one component of abuse that also included mutual masturbation and oral sex. The evidence was sufficient.

Prosecutorial Misconduct

Coleman next contends the prosecutor committed misconduct during closing argument by inviting the jury to make negative inferences from Coleman's exercise of his constitutional rights and improperly bolstering TMB's credibility.

To prevail on a claim of prosecutorial misconduct, Coleman must show that "the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial."[42] Prosecutorial misconduct does not constitute prejudicial error unless there is a "substantial likelihood the instances of

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[40] 67 Wn. App. 663, 668–69, 838 P.2d 701 (1992).

[41] See State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990) (evidence of kissing sufficient to prove sexual contact under indecent liberties statute).

[42] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

misconduct affected the jury's verdict."[43]

When a defendant fails to object, request a curative instruction, or move for mistrial, the traditional rule is that the defendant has waived the issue for appeal unless the misconduct was "so flagrant and ill intentioned that no curative instruction could have obviated the resulting prejudice."[44] In State v. Warren,[45] however, the Washington Supreme Court left open the possibility that where misconduct directly violates a constitutional right, review may be had under the "manifest constitutional error" standard.[46] Coleman relies principally upon State v. Jones,[47] a case that applied the manifest constitutional error standard without comment. Both standards require a showing of prejudice, and Coleman has demonstrated none. Accordingly, it makes no difference to this case which standard applies.

The prosecutor noted in closing argument that "the defendant was in the courtroom" when TMB testified, and "there were relatives of his in the courtroom," many of which had "tossed [TMB] aside" and "throw[n TMB] to the wolves."[48] Coleman argues this improperly invited the jury to make negative inferences from his exercise of his Sixth Amendment right to confront witnesses and to have a public trial.

In Jones, the prosecutor suggested in closing that the defendant's insistence

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[43] State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

[44] State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995).

[45] 165 Wn.2d 17, 195 P.3d 940 (2008).

[46] Id. at 26 n.3.

[47] 71 Wn. App. 798, 863 P.2d 85 (1993).

[48] RP (Feb. 6, 2008) at 12, 15, 20.

on "staring" at the child victim belied his professed concern for her and so disturbed and frightened the witness that she refused to return to court.[49] This court held that "the State's commentary constituted an impermissible use of constitutionally protected behavior" and amounted to "error of constitutional magnitude."[50] Coleman relies on Jones.

But this case is unlike Jones. There, the prosecutor's comments invited the jury to make negative inferences about the defendant (i.e., that he lied when he professed love and concern for the victim). Here, the prosecutor's remarks were based on evidence, not speculation, and did not involve Coleman's invocation of his right to trial. The prosecutor pointed out that TMB had been uncomfortable testifying about sexual abuse in front of strangers, Coleman, and his relatives, and had been more forthcoming when he spoke to the child interview specialist and the pediatrician. The thrust of the argument was about credibility, not Coleman's exercise of his rights. The argument was not improper.[51]

Coleman also contends the prosecutor referenced facts outside the evidence in an attempt to "bolster TMB's credibility and lessen the jury's scrutiny of his testimony."[52] In the portion of the argument to which Coleman refers, the prosecutor

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[49] 71 Wn. App. at 806.

[50] Id. at 812 (because the evidence was overwhelming, the misconduct was harmless beyond a reasonable doubt).

[51] See State v. Gregory, 158 Wn.2d 759, 807–08, 147 P.3d 1201 (2006) (prosecutor's argument highlighting victim's discomfort during testimony was not a comment on right to confrontation when used to argue the victim's credibility).

[52] Appellant's Br. at 30.

acknowledged that TMB was confused about whether the abuse at the cabin happened while he was living with his grandparents, and with whom he traveled to the cabin. The prosecutor then stated:

> He's a little kid. Children do not remember things as well as adults and certainly not as well as adults like the defendant and his parents who have rehearsed things down to the minute about what happened, for instance, at the cabin.
>
> It's natural that he's going to get some of these little details mixed up. It actually is more likely that a witness would have the little details mixed up than somebody who knows every single thing about what happened on what was at the time allegedly and uneventful trip.
>
> You can look at the quality of the witness's memory while testifying, and that's sort of what I was just talking about. [TMB's] memory is what you would expect of a nine or ten year old kid to remember. The defendant's memory is what you would expect from somebody who has gone through it and mapped it out in order to be able to tell it to you.[53]

Coleman contends these remarks are similar to those held to be misconduct in State v. Boehning,[54] where the prosecutor referred in closing argument to dismissed rape charges and to statements by the victim not admitted at trial, suggesting that the inadmissible statements supported the dismissed charges and were more reliable because they were obtained in a "safer environment" than open court.[55] Division Two of this court reversed, holding that the remarks asked the jury to infer that Boehning was guilty of crimes that had been charged but dismissed and "improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on

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[53] RP (Feb. 6, 2008) at 21–22.

[54] 127 Wn. App. 511, 111 P.3d 899 (2005).

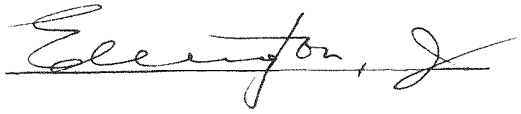
[55] Id. at 517.

improper grounds."[56] The court also indicated that the prosecutor's argument improperly bolstered the victim's credibility by "arguing that [her inadmissible] out-of-court statements were consistent with her statements at trial and that she had disclosed even more" to investigators.[57]

This case is not like Boehning. Coleman contends the prosecutor improperly urged the jury to apply less scrutiny to TMB's testimony because children have poorer memories than adults. But the fallibility of memory is a matter within the common knowledge of the jury, and TMB was able to offer details in the private interviews that he was unable to recall at trial.

Further, even if the argument were improper, Coleman made no objection at trial, and fails to show that an instruction would have been insufficient to cure any possible prejudice.

We remand for reconsideration of the sealing order, and affirm in all other respects.



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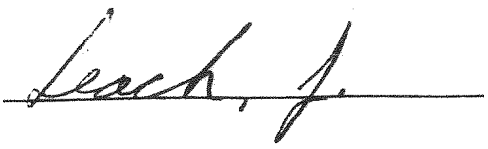

[56] Id. at 522.

[57] Id. (emphasis omitted).